

FEDERAL MAGISTRATES COURT OF AUSTRALIA

KWOK v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1777

MIGRATION – MRT decision – spouse visa – genuine and continuing relationship – finding that applicants were not witnesses of truth – reference to evidence given in interview to delegate – no reliance on “information” not “given” to Tribunal – no breach of s.359A(1) – application dismissed.

Freedom of Information Act 1982 (Cth)
Migration Act 1958 (Cth), s.359A
Migration Regulations 1994 (Cth), reg.1.15A

Applicant S301/2003 v Minister for Immigration & Multicultural Affairs [2006] FCAFC 155
Collins v Minister for Immigration & Ethnic Affairs (1981) 36 ALR 598
NBKT v Minister for Immigration & Multicultural Affairs [2006] FCAFC 195
SZBYR v Minister for Immigration & Citizenship [2007] HCA 26
VAF v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 206 ALR 471
You v Minister for Immigration & Citizenship [2007] FMCA 1064

Applicant:	OI CHU KWOK
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 2013 of 2007
Judgment of:	Smith FM
Hearing date:	15 October 2007
Delivered at:	Sydney
Delivered on:	15 October 2007

REPRESENTATION

Counsel for the Applicant: Mr N Poynder

Counsel for the First Respondent: Mr P Silver

Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) The application is dismissed.
- (2) The applicant must pay the first respondent's costs in the sum of \$5,000

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 2013 of 2007

OI CHU KWOK
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. In June 2006 Mr Zhou attended at the Shanghai office of the Department of Immigration and applied for two visas to allow him to migrate to Australia as the spouse of an Australian permanent resident, Ms Kwok. Under the relevant scheme of the *Migration Regulations 1994* (Cth), he was required to apply for a class UF (partner – provisional) subclass 309 visa and also a class BT (partner – migrant) subclass 100 visa. He presented evidence that he had married Ms Kwok in Shanghai on 1 June 2006, and claimed that their relationship was genuine and continuing.

2. A delegate refused both visas on 29 November 2006, on the ground that he was not satisfied as to the genuineness of the marriage at the time of application. Ms Kwok then exercised her right of applying for review by the Migration Review Tribunal. It affirmed the delegate's decision in a decision dated 23 May 2007 and handed down on 4 June 2007.
3. Ms Kwok now applies to the Court to set aside the Tribunal's decision, and to order it to reconsider her husband's entitlement to the two spouse visas. I can only make these orders if I am satisfied that its decision was affected by jurisdictional error. I do not have power myself to decide the nature of the spousal relationship, nor whether Mr Zhou should be granted any visa to enter Australia.
4. A single ground of jurisdictional error has been argued, which is that the Tribunal made its decision without first inviting the review applicant to comment on "*particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review*" pursuant to s.359A(1) of the *Migration Act 1958* (Cth), as it stood at the time of the Tribunal's decision.
5. The Minister concedes that no invitation to comment was sent to either the review applicant or the visa applicant, but argues that there was no "information" coming within s.359A(1) giving rise to that obligation. It is also argued, in the alternative, that to the extent that the Tribunal relied upon "information", it was information "*that the applicant gave for the purpose of the (review) application*" within s.359A(4)(b), so as to exclude any obligation under s.359A(1). It is common ground that, if an obligation arose under s.359A(1), the failure to serve an invitation for written comments would provide jurisdictional error vitiating the Tribunal's decision.
6. Considerable "unbundling" of the Tribunal's reasoning process is required in this case to address the above issues, and this needs to be understood by reference to the background to its decision.
7. Before making his decision, the delegate interviewed Mr Zhou and Ms Kwok on the day that they presented the visa applications. In his statement of reasons, he said:

The applicant and the sponsor provided inconsistent information during interviews with regards to various aspects of their first meeting and relationship development. They were both vague in many of their responses and often did not answer questions put to them. In addition, the applicant and sponsor demonstrated limited knowledge regarding each other's personal circumstances.

8. He then listed in seventeen numbered paragraphs “*some of the concerns arising from the interviews with the applicant and the sponsor*”. He was not satisfied that the applicant and the sponsor had shared the same experiences as claimed. He said: “*this raises doubt as to the genuine nature of the relationship. In addition, I find the parties' knowledge of each other's backgrounds is poor and not consistent with two people who claim to be in a genuine and continuing relationship.*” He then addressed the evidence relevant to the tests of a spousal relationship set out in reg.1.15A of the Migration Regulations, which were required to be satisfied at the time of application under the criteria for the temporary subclass 309 visa. He said that on balance that he was not satisfied that the relationship exhibited factors of a genuine and continuing spouse relationship within the meaning of that regulation.
9. On appeal, the application for review was forwarded to the Tribunal with a covering letter by an agent employed by Ms Kwok. The letter also enclosed a request for access to the Departmental file under the *Freedom of Information Act 1982* (Cth), and “*a copy of the DIMIA refusal letter*”. I find that the latter document was probably given to the Tribunal in response to a question on the application for review, which said: “*you need to give the Tribunal information about the decision that you want reviewed*”, and gave the option of “*I have attached a copy of the DIMIA decision and covering letter*”.
10. Counsel for both parties made submissions on whether the attachment of the DIMIA decision in this manner amounted to the ‘giving’ to the Tribunal for the purposes of s.359A(4)(b) of all the information set out in the delegate's decision, and, in particular, the information about what Mr Zhou and Ms Kwok said to the delegate in their interviews. I was referred to a decision of Reithmuller FM in *You v Minister for Immigration* [2007] FMCA 1064, which concluded at [27] that merely forwarding a copy of the delegate's decision in this manner would not amount to the giving to the Tribunal of the information contained in the

decision “*for the purpose of the application*”. I am informed that *You* is under appeal by the Minister.

11. As I shall explain, it is not necessary for me to decide in this case whether I should follow that decision. There was in this case, much more in Ms Kwok’s communications to the Tribunal which amounted to the ‘giving’ to the Tribunal of information as to what was said in the interview to the delegate, with an invitation to consider that information afresh in the light of further information and explanations.
12. Ms Kwok’s agent forwarded a number of documents to the Tribunal which made her case clearer. They included statements from each of Mr Zhou and Ms Kwok, and what was described as “*answers of the visa applicant to the questions raised in the refusal letter of the Department*”. In these documents, they accepted that they had given the evidence to the delegate in interview which was set out in his list of 17 concerns, and that it displayed the inconsistencies and other difficulties which he identified. They accepted that they had given inconsistent evidence about their claimed first meetings in Sydney during January 2006, which they had claimed arose from an introduction effected by Mr Zhou’s brother.
13. Their case to the Tribunal in response to the delegate’s concerns was that, in fact, no meetings had occurred in Sydney, and that all the evidence of both of them about this to the delegate was false. They said that they had actually met when Ms Kwok responded to Mr Zhou’s newspaper advertisement seeking a relationship, and that their first contacts were by telephone between Australia and Shanghai before they met in Shanghai in March 2006. They sought to excuse the giving of false information to the delegate, on the ground that “*according to Chinese custom, it was a shame to advertise for finding someone to get married*”. Their statements also sought to explain the other points of concern identified by the delegate, arising from their evidence to the delegate about their contacts and their wedding.
14. Ms Kwok’s written statement explicitly adopted Mr Zhou’s responses to the delegate’s concerns. For example, her statement invited the Tribunal: “*Please refer to my husband’s statement for details of our relationship and to his answers for the questions raised in the refusal letter.*” She was then questioned about the same matters in the course

of a hearing conducted by the Tribunal, in which Mr Zhou and Ms Kwok gave evidence by telephone from China.

15. Ms Kwok was asked about the first concern of the delegate: that Mr Zhou “*does not know the sponsor's Cantonese name; the name she uses on her passport*”. She gave evidence to the Tribunal which appeared to confirm that Mr Zhou had given that evidence to the delegate, and then sought to explain it (see transcript questions 50 through 54).
16. In relation to the delegate’s concerns numbered 2 to 12, she agreed that they had given inconsistent and entirely false evidence to the delegate about their first meeting (see transcript questions 54 through 58).
17. She was also questioned concerning the delegate's concern number 13: that “*the applicant claimed he proposed over the telephone in May 2006, however, the sponsor claimed the applicant proposed with flowers at the airport in May 2006*”. At transcript questions 50 and 60, Ms Kwok agreed that she had told the delegate that Mr Zhou proposed at the airport, and that he had claimed that he proposed over the telephone. Her explanation for the inconsistency, in my opinion, left it open to the Tribunal to conclude that she had admitted that in fact he had proposed on the telephone and not at the airport. She suggested that she had told the delegate otherwise, because she thought it was better to refer to the subsequent bringing of flowers to the airport as “the formal proposal”.
18. Following the hearing, further submissions were made to the Tribunal by the applicant's agent. They sought to address the concerns of the delegate as to evidence of who had attended the wedding in Shanghai. The submission including the statements:

14. Now they both admitted at the hearing that they had told lies about when and how and where they first met.

15. They meant to tell a lie on the issue of how they first met. But they had to go on telling a lot of lies around the circumstances of their first meeting. It was all because they told the first lie.
19. The submission sought to minimise the significance of this conduct. It also included the statement:

27. It is my client's request that the Tribunal investigates on all the evidence provided and gives a reason if it rejects any of it.

20. The Tribunal's statement of reasons referred to the relevant legislation, and the requirements of reg.1.15A in particular. It addressed the mandatory considerations set out in reg.1.15A(3), of financial aspects of the relationship, nature of the household, and social aspects of the relationship, but noted the difficulty of expecting evidence about these matters as at the date of visa application in the present case. The Tribunal therefore, and understandably, gave more emphasis to the consideration of the evidence relating to mutual commitment and the genuineness of the relationship between Mr Zhou and Ms Kwok at the time of visa application.

21. The Tribunal affirmed the delegate's decision for the essential reason:

The following evidence and reasons, satisfied the Tribunal it should reject the applicants' claim to be in a genuine and continuing relationship as untrue.

22. The Tribunal then addressed the 17 evidentiary concerns listed by the delegate, addressing them in four substantive paragraphs. It first considered Mr Zhou's lack of knowledge of the name used by his wife in her passport. It referred to Ms Kwok's evidence about this given at the hearing, which I have identified above, and said:

The Tribunal does not believe it plausible such information would be unknown to the visa applicant (ie the correct pronunciation of the name).

23. I do not consider that this part of its reasoning reveals reliance upon any information which was not given by Ms Kwok to the Tribunal at the hearing, for the purposes of s.359A(4)(b).

24. The Tribunal then addressed the delegate's concerns numbered 2, 3, 4 and 5, about the inconsistent evidence given at the interview about the couple's claimed introduction and first meetings in Sydney. It referred to their evidence given to the Tribunal that, in fact, they met through a newspaper advertisement, and to their explanation for not providing this information to a delegate and for giving him false information. It said:

The Tribunal is not satisfied with the review applicant's evidence that the visa applicant provided the false evidence to the delegate merely to "save face". The Tribunal is satisfied the evidence was provided to deceive the delegate.

25. In my opinion, the information which was relied upon when drawing that adverse conclusion was information which was given to the Tribunal by Ms Kwok, either directly or by her adoption of Mr Zhou's statements to the Tribunal, being their evidence of false information being given to the Department and their explanations for this conduct. The actual contents of the two versions given to the delegate, giving rise to the inconsistencies discerned by the delegate, was not itself a reason for the adverse finding of the Tribunal. Moreover, I also consider that the case presented by Ms Kwok to the Tribunal involved the 'giving' to the Tribunal of the evidence which she and Mr Zhou had given to the delegate in their interviews. On both bases, therefore, any information relied upon in this paragraph was not covered by s.359A(1).

26. The Tribunal then addressed matters 6 through 13 of concern to the delegate. These identified the couple's evidence to the delegate as to their contacts after the supposed first meeting in Australia, including their inconsistent evidence about Mr Zhou's proposal of marriage. The Tribunal specifically addressed only the applicant's evidence given to it at the hearing on this last matter, and said:

However, she had apparently falsely told the delegate he had proposed at the airport. The Tribunal is not satisfied this was a mistake on her part. The Tribunal is satisfied that such a recent important incident could be expected (unless there were reasonable grounds explaining why) to have been remembered accurately by the parties if the relationship was genuine. This is a further reason the Tribunal was not satisfied the applicants relationship was genuine and continuing as claimed.

27. In my opinion, the Tribunal's reference to "apparently falsely told the delegate" made a factual finding based on the applicant's evidence to the Tribunal in the hearing, which I have identified above. To the extent that the Tribunal also drew upon inconsistencies in the evidence given to the delegate in the interviews, in my opinion, that evidence was represented to the Tribunal by way of the submissions and Ms Kwok's evidence to it which affirmed or invited reference to the delegate's

account of the interviews (see *NBKT v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 195 at [60] - [63]; also *Applicant S301/2003 v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 155 at [16]-[17]) It was therefore covered by s.359A(4)(b).

28. The Tribunal then set out the delegate's concerns numbered 14 to 17, which related to the couple's evidence about their wedding. The Tribunal noted their explanations addressing some of the delegate's concerns, but does not appear to have arrived at conclusions on those explanations materially affecting its assessment of the case. The Tribunal's reference to this part of the delegate's reasons, and to the couple's evidence to the delegate to which it related, does not, therefore, appear to have been a material part of its reasoning. No material obligations under s.369A(1) therefore arose in relation to that evidence.

29. The Tribunal then said:

After the Tribunal hearing further written evidence and submissions were lodged. Two of such submissions were largely similar. Be that as it may, it included more detailed evidence as to why specified family members did not attend the wedding between the applicants. It should be understood however this issue was raised initially by the delegate and again raised at the hearing with the Tribunal. The Tribunal is not satisfied it is plausible such evidence would not be put at hearing, given it is satisfied it provided a reasonable opportunity to do so, if the subsequent written submissions provided the real reasons the specified relatives did not attend the wedding. The Tribunal therefore does not give such evidence any weight. Secondly, it was also stated that a lie to the Department was serious but arguably reasonable as the lie 'makes little difference to the Department.' The Tribunal disagrees with this submission. To say the applicants lied and are sorry is one thing. However, this did not appear to be submitted. It was submitted inter alia the applicants had to 'go on to tell a lot of lies around the circumstances of their first meeting'; 'they misled the Department'; the lie 'makes little difference to the Department'; but their relationship is none-the-less genuine. The point is, this is not the only issue of credit in this decision (as set out above), and the Tribunal is sufficiently satisfied the applicants' are not witnesses of truth that it intends to impugn all their evidence to be in a genuine relationship. The Tribunal formed this preliminary view based on evidence in the delegate's decision (lodged with the Tribunal). Nothing stated by either

applicant at hearing, satisfied it this view was not correct. Accordingly, the Tribunal does not believe it necessary to provide a s359A letter in this case.

30. The first part of this paragraph draws an adverse finding from Ms Kwok's failure to present detailed evidence on an issue raised by the delegate until after the hearing. This does not reveal the reliance upon information which was not given to the Tribunal.
31. It is the Tribunal's statements at the end of this paragraph which provided the focus of the submissions for the applicant that there was a breach of s.359A(1). In particular, it was argued that the Tribunal's statement that it had "*formed this preliminary view [that the applicants are not witnesses of truth] based on evidence in the delegate's decision*" revealed reliance upon 'information' given by the applicants to the delegate and not to the Tribunal. It was argued that the Tribunal's reference to the delegate's decision as "lodged with the Tribunal" appeared to explain why it thought that a s.359A(1) invitation was unnecessary. If so, its opinion that s.359A(4)(b) applied because of the attachment of the decision to the review application was incorrect, if the Court followed *You v Minister for Immigration & Citizenship* [2007] FMCA 1064.
32. I accept that this may indeed have been the reasoning of the Tribunal in relation to its obligations under s.359A(1), and that its correctness will be addressed by the Full Court in the forthcoming appeal from *You*. However, there were, in my opinion, other reasons why the Tribunal was not obliged to serve a s.359A(1) invitation in this case arising from its general finding that the applicants were not witnesses of truth "*based on evidence in the delegate's decision*", even if I assume that its "preliminary" opinion about this also became one of its ultimate reasons for affirming the delegate's decision.
33. In my opinion the Tribunal's reference to "*the evidence in the delegate's decision*" should be understood as a reference to the evidence of Ms Kwok and Mr Zhou given to the delegate in their interviews, which the delegate identified in his list of 17 concerns. However, its conclusion from reading this evidence: that they were not witnesses of truth, did not use "information" within the meaning of s.359A(1) as a reason for affirming the delegate's decision,. The

delegate's list of concerns did no more than identify inconsistent and unpersuasive evidence presented to the delegate, rather than evidence containing “*in their terms a rejection, denial or undermining of*” the couple’s claims to have entered into a genuine and continuing relationship (compare *SZBYR v Minister for Immigration & Citizenship* [2007] HCA 26 at [17] and [18]). The Tribunal’s reasoning by reference to their statements given to the delegate shows an adverse appraisal of their evidence to the delegate, but not the identification of “information” which disproved their claimed relationship. Applying *SZBYR*, I therefore do not consider that s.424A was “engaged at all” in this part of the Tribunal’s reasons.

34. I also do not accept the submission of the applicant’s counsel, that the Tribunal’s reference back to the delegate's decision showed the use of other “information”, being the delegate's own adverse factual conclusions or his ultimate conclusion about Mr Zhou’s entitlement to the visa. In its own terms, the Tribunal’s adverse finding about the general credibility of the couple was based only upon its evaluation of their “evidence” given to the delegate, which was set out “in the delegate’s decision”. The Tribunal would have entered into an area of irrelevant consideration, if it had given weight to the fact of an adverse opinion by the delegate, either on a particular issue or on an ultimate issue (see *Collins v Minister for Immigration & Ethnic Affairs* (1981) 36 ALR 598). However, I do not consider that the Tribunal made that error.
35. Nor do I accept that the Tribunal's reference to the “*evidence in the delegate’s decision*” shows an adoption of any factual findings arrived at by the delegate, as a part of its ultimate reasons for finding that the applicant’s were not witnesses of truth. Its earlier reference to “*this is not the only issue of credit in this decision (as set out above)*”, shows that its ultimate reasons for rejecting their credibility were the particular concerns it had earlier addressed, and which I have examined above. The Tribunal then explained that this ultimate conclusion confirmed a “preliminary view” it had formed after reading the evidence set out in the delegate’s decision. I do not accept that the Tribunal drew anything from the delegate's decision, other than information as to the evidence given to the delegate on interview which had been summarised by the delegate.

36. It is therefore unnecessary for me to do more than note a further problem facing the submission that the Tribunal drew more from the delegate's decision than a source of the statements made by the couple when interviewed. Even if it had adopted parts of the delegate's reasoning as its own reasoning, this would not be the use of "information", but rather the acceptance of appraisals of evidence performed by the delegate. This would not give rise to any obligations under s.359A(1), under the observations in *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 206 ALR 471 which were cited with approval in *SZBYR* at [18].
37. For all the above reasons, I am not satisfied that the challenged paragraph in the Tribunal's reasons made use of any information which came within s.359A(1). It is therefore not strictly necessary for me to consider the alternative argument for the Minister, which was that all the "evidence in the delegate's decision" had been republished by being "given" to the Tribunal within s.359A(4)(b) in the course of Ms Kwok's written and oral evidence and submissions to the Tribunal. My short opinion is, as I have explained when examining the Tribunal's reasons relating to particular items in the delegate's list of concerns, that the Tribunal's adverse credibility findings made use only of information which had been given to the Tribunal by Ms Kwok when addressing the delegate's list of concerns.
38. For the above reasons, I am not satisfied that a failure to comply with s.359A(1) is made out in relation to any part of the Tribunal's reasoning. I must therefore dismiss the application.

I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Michael Abood

Date: 24 October 2007